net" customers and locations.[56] Because the availability of digital interconnection, unbundling and resale will ensure that CLECs will have the most deployment options – and that consumers will have competitive choices, the Commission should rebuff ILEC attempts to use forbearance as a means of closing off any of the three entry methods provided for by Congress in Section 251(c).[57]

If the Commission were to grant the RBOC requests for forbearance from Section 251(c), competition for (and, likely, the deployment of) advanced services would be limited to customers and locations currently within reach of facilities-based CLEC networks. WorldCom's comments provide an excellent discussion of why all three methods of entry – interconnection, unbundling and resale are essential to the widespread deployment of xDSL services.[58] ALTS/e.spire/Intermedia note that WorldCom's analysis applies equally to all advanced service offerings – whether they be xDSL, ATM, frame relay or a technology that has not even been named yet. To realize the goal of Section 706, the Commission must reject the RBOCs' requests for forbearance and must instead ensure that interconnection, unbundling and resale all are held open as viable methods of competitive entry into the advanced services market.

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56 *See LCI Comments,* at 4 ("Regulators must preserve the three entry strategies created by Congress as the network evolves.").

57 U S West, for example, mischaracterizes a statement made by Charles McKinn, President and CEO of Covad, an ALTS member and facilities-based CLEC, in a misguided attempt to prove that CLECs do not need access to xDSL electronics. However, Mr. McKinn merely noted that *Covad* will not be seeking access to xDSL electronics – even though other ALTS members would. Thus, U S West's discussion only offers proof that CLECs seeking to use UNEs as a method of entry may choose to use only some of the UNEs that ILECs are compelled to offer under Section 251(c).

58 *WorldCom Comments,* at 10-17.

C. ALTS' Petition Sets Forth a Better Way to Meet the Mandate of Section 706

ALTS/e.spire/Intermedia note that only the ILECs objected to the relief requested in the ALTS Petition.[59] LCI, for example, notes that:

> ALTS has sought a declaratory ruling on several distinct points. It is critical that the Commission grant the petition on all these points – because the success of competition in advanced, broadband services will depend on ILEC compliance with every one of the market-opening provisions of the Act, and not just some.[60]

Indeed, most commenters focused on specific proposals made in the ALTS petition. Commercial Internet Exchange Association, TRA, and KMC were among the many commenters agreeing that the Commission should take swift action to ensure that ILECs meet their Section 251(c) interconnection, unbundling and resale obligations for xDSL, frame relay, ATM and *all* advanced services.[61] Nextlink, CompTel, and AT&T were among the many voices calling for immediate collocation reform.[62] KMC and TRA were among the commenters urging the Commission to coordinate its efforts in this area closely with the states.[63]

The comments also revealed the need for the Commission to clarify ILEC data UNE obligations. For example, Nextlink notes that it "has encountered tremendous difficulty in obtaining nondiscriminatory access to loops that utilize IDLC."[64] The IDLC problem has the

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59 *See, e.g., SBC Comments,* at 3 (arguing that ALTS' petition is "flatly inconsistent" with Commission precedent in which it deregulated CPE and relaxed its regulation of nondominant providers).

60 *LCI Comments,* at 8.

61 *Commercial Internet Exchange Association Comments,* at 6; *TRA Comments,* at 6; *KMC Comments,* at 2.

62 *Nextlink Comments,* at 16-17, *CompTel Comments*, at 7, and *AT&T Comments,* at 8-9.

63 *KMC Comments,* at 7-8; *TRA Comments,* at 9.

64 *See, e.g., Nextlink Comments,* at 11.

potential to become pervasive. IDLC loops reportedly comprise 80 percent of BellSouth's network in many areas and most new loops being built today include IDLC technology or a derivative thereof. WorldCom submits that "[a]pproximately 20 to 30 percent of U.S. subscribers are served via this fiber/copper combination, mostly in suburban and rural areas."[65] Nextlink's account of the discriminatory ILEC practice of offering a "spare" copper loop instead of the more advanced IDLC loop that the ILEC uses to provide a customer with service underscores the need for the Commission to clarify that Section 251(c) requires ILECs to give ILECs access to naked copper, conditioned loops, and loops with electronics. UNEs must be defined based on functionality. For example, loops that incorporate remote DSLAMs are not susceptible to sub-loop unbundling. Thus, they must be unbundled as an end-to-end functionality, incorporating the DSLAM. For "home run loops", CLECs should have the option of taking the loop with or without the DSLAM, provided that collocation of its own DSLAM equipment is technically, practically and economically feasible.

D. ALTS' Solution Is Not "More Regulation"; It Is a Market Structure Conducive to "More Competition"

Despite the efforts of the ILECs to mischaracterize the ALTS Petition as a plea for "more regulation", it is plain to see that ALTS merely requests that the Commission clarify regulation that already is in place.[66] Indeed, ALTS' Petition only seeks full implementation of a congressionally designed market structure that is conducive to "more competition". Because ILECs continue to possess all of the benefits of incumbency and monopoly control, "more

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65 *WorldCom Comments,* at 8.

66 *See, e.g., Ameritech Comments,* at 8 (arguing the "ALTS' proposals would heap layer after layer of regulation upon [the] emerging market place [for advanced telecommunications services] and further discourage new investment").

competition" is a prerequisite to "less regulation". Competition cannot simply be decreed. Rather the transition from a monopoly paradigm to a competitive paradigm must incorporate regulatory safeguards and incentives designed to level the playing field and dissipate monopoly control. Sections 10 and 271 provide examples to illustrate that Congress shared this view when it enacted the 1996 Act.

V. THE CREATION OF ILEC DATA AFFILIATES CREATES MANY PROBLEMS AND SOLVES NONE

Ameritech and U S West each filed comments demonstrating that they hold closely the unfounded notion that an end-run can be made around the provisions of Section 251(c) by creating ILEC alter egos.[67] ALTS/e.spire/Intermedia will discuss the general policy shortcomings of Ameritech's separate data affiliate proposal below. But first, it bears repeating that the Commission should not countenance Ameritech's proposal to deploy advanced telecommunications capability through a "non-ILEC" affiliate. The concept of ILECs creating non-ILEC affiliates is completely at odds with the structure and language of Section 251. Section 251 creates a hierarchy of obligations. First, Section 251(a) imposes duties on all telecommunications carriers – this applies to IXCs, CLECs and ILECs. Second, Section 251(b) imposes additional obligations on *all* local exchange carriers. And finally, Section 251(c) imposes another layer of obligations on ILECs. As e.spire described in its initial comments, Section 251(h) sets forth a definition of "incumbent local exchange carrier" clearly designed to prevent ILECs from trying to shed their ILEC status, and corresponding Section 251(c) duties.[68]

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67 *See Ameritech Comments,* at 4-5; *U S West Comments,* at 14-17.

68 *e.spire Comments,* at 8-9.

U S West's attempt to shed its ILEC status also must fail.[69] Indeed, U S West's claim that it is not "acting as an 'incumbent local exchange carrier'" when it is providing advanced data services is based an erroneous interpretation of "telephone exchange service". Despite U S West's best efforts, "telephone exchange service" includes, *but is not limited to*, circuit-switched voice traffic. U S West's reliance on the definition of "exchange" that was established in a nearly 20-year old FCC order that was issued prior to the advent of so called "advanced services" and the 1996 Act is misplaced. Section 3(47)(A) defines "telephone exchange service" simply as "service within a telephone exchange, or within a connected system of telephone exchanges . . . ." Section 3(47)(B) provides an even broader definition of telephone exchange service by eliminating the reference to an "exchange", and focuses on the ability of a subscriber to "originate and terminate a telecommunications service". Moreover, subsection B makes clear that such services are not restricted to those provided through switches, but may be provided "through a system of switches, transmission equipment, or other facilities (or combination thereof) . . . ."

The extremely broad scope of this definition is further clarified by the definition of "telecommunications service" under the Act. Section 3(46) of the Act defines "telecommunications service" simply as "the offering of telecommunications for a fee directly to the public . . . ." Section 3(43) of the Act defines "telecommunications" as "the transmission, between or among points specified by the user, of information of the user's choosing . . . ." Thus, U S West's attempt to limit the definition of "telephone exchange service" is wholly inconsistent with the extremely broad definitions contained in the Act. If Congress intended to limit ILEC interconnection, unbundling and resale requirements under Section 251(c) to circuit-switched

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69 *U S West Comments,* at 14-17.

voice traffic it certainly would have said so. However, the expansive definitions contained in the Act reflect Congress' attempt to avoid restrictive provisions, and to craft legislation that would accommodate new technologies and new service applications.

A. Permitting ILECs to Establish Separate Data Affiliates Would Send the Wrong Economic Signals and Would Distort Incentives for the Placement of and Investment in Advanced Network Infrastructure

While it is tempting to believe that regulators can separate "essential" data equipment and facilities from "non-essential" ones, and parse them between the regulated ILEC and its unregulated data affiliate, in the real world, such a clean and clear division is not feasible. After an initial allocation of assets between the ILEC and its data affiliate, the decision on where to deploy new equipment and facilities will nearly always be made by the common corporate parent of the ILEC and its data affiliate. Given the choice of subjecting facilities to the Act's interconnection requirements, versus shielding them from use by competitors, there can be little doubt that ILEC holding companies will choose to allocate advanced facilities and equipment to the unregulated data affiliate whenever possible. Thus, critical networking decisions will be driven by the desire to avoid regulation and interconnection, rather than consideration of the best way to promote network efficiency or facilitate creation of a seamless "network of networks".

Indeed, the creation of unregulated data networks inevitably would lead to an undesirable "Balkanization" of the telecommunications network. As described earlier, voice and data networks rapidly are converging, as circuit switched networks give way to broadband, packet switched-based networks for both voice and data telephony. This is a desirable outcome, as voice traffic over time can be transmitted most efficiently as just another piece of data. But separation of voice and data networks would stand in the way of this natural network evolution

as ILECs strive to preserve unnecessary and undesirable demarcations between voice and data networks simply to avoid regulation of their next generation technologies.

The only way such an undesirable outcome could be avoided – if at all – would be to create an extensive new set of rules on how assets are to be allocated, and assign a new team of zealous regulators to constantly monitor the activities of both ILECs and their data affiliates. Such an effort would be the most "regulatory" of all possible outcomes and, thus, would be inconsistent with the general purposes of the 1996 Act. Even if the Commission were inclined to establish such oversight, it is no secret that attempts by both federal and state regulators to control the interaction of ILECs and their affiliates over the years have been largely unsuccessful. There is no reason to believe that their efforts would be more fruitful in controlling ILEC data affiliates.

B. There Is No Functional or Practical Basis Upon Which Regulatory Partitioning Could Be Accomplished

At the heart of Ameritech's in-region data subsidiary proposal is the assumption that there must exist *some* functional and practical way to distinguish between certain network functions and facilities that should be subject to Sections 251(c) and 271, and those that should not. Thus, even if the legal defects of Ameritech's proposal could be set aside (and, it bears noting that no one yet has proposed how it could be done), there is no functional or practical way to implement such an artificial network separation. For example, none of the following potential bases for partitioning appears to be workable:

- *Equipment installed prior to February 8, 1996, as opposed to equipment installed afterwards.* The fundamental problem with this proposal is that, since all equipment, including mature bottleneck equipment, eventually wears out and has to be replaced, this dichotomy would enable the ILECs to move *all* their plant into a non-regulated

subsidiary on a schedule completely within their control – or as quickly as they needed to avoid competitors' requests for Section 251(c) interconnection, unbundling and resale.

- *Technology invented prior to February 8, 1996, as opposed to technology invented afterwards.* The basic problem with this approach is that technologies tend to evolve, rather than emerge at distinct dates and then stay frozen in time. For example, TCP/IP is clearly a mature technology (it has been around for twenty years), but the emergence of Cisco fast packet routers and high bandwidth now makes it attractive for voice traffic. Endless disputes would ensue over the appropriate "born on date" to be associated with equipment incorporating modifications to existing technology.

- *"Bottleneck" network elements, as opposed to "competitive" network elements.* The core problem with this approach is that it is inconsistent with the plain language of Section 251(c) and the FCC's corresponding decision to define UNEs without regard to the extent of market competition for each. The practical problem with this approach is that the Commission would find itself mired in a sea of disputes as to what elements actually are available on a competitive basis. There also would be endless disputes over the separation, pricing and combination of such services.

- *"Separate but equal" networks for voice and data.* The problem with this approach is that network efficiencies require common use of NIDs, loops, derived loops, CO floor space and power, and DSLAMs. Moreover, because most bottleneck facilities currently cannot be efficiently duplicated for both voice and data, this approach would have little practical effect.

- *Separate "voice" and "data" portions of the PSN.* The problem with this approach is that, beyond the end user service level, it is almost impossible to specify which portions of the existing network pertain solely to voice, and which pertain solely to data. Indeed, separate voice and data networks do not exist. Indeed, data can travel over voice circuits and voice can travel in cells or packets. Specific pieces of equipment also defy classification. For example, DSLAMs are used to separate data and voice traffic. Technology also will blur and erase distinctions. For example, packet switched voice applications now are becoming prevalent.

VI. THE ILECS CANNOT AVOID THE SECTION 10(d) REQUIREMENT THAT ANY FORBEARANCE MUST AWAIT FULL IMPLEMENTATION OF THE SECTION 251(c) AND 271 INTERCONNECTION, UNBUNDLING AND RESALE MANDATES

Numerous commenters agreed with ALTS that Section 10(d) of the Act simply bars the Commission from granting the forbearance sought by RBOCs under Section 706 until their

advanced services have been unbundled, and made available for cost-based interconnection and resale.[70] Significantly, Section 271(d)(4) of the Act also prohibits the Commission from limiting the application of the "competitive checklist" in the context of Section 706 proceedings or otherwise. This, of course, is consistent with recent statements provided to Congress by every member of the Commission indicating a belief that Section 706 does not contain an exception from implementation of Section 271 requirements.[71]

Half-hearted ILEC attempts to avoid these statutory restrictions on the availability of forbearance are unpersuasive. U S West, for example, suggests that the language of Section 706 is "broad and mandatory,"[72] but fails to explain how such a general reference to forbearance in Section 706 can "trump" the express limitations on use of forbearance contained in Section 10(d). Similarly, after expressly admitting that Section 10 gives the Commission broad authority to forbear – "except for Sections 251(c) and 271" – SBC goes on to suggest without support that Section 706 somehow empowers the Commission to disregard this statutory admonition.[73] The remaining ILEC commenters chose to ignore the Section 10(d) and 271(d)(4) limitations on forbearance entirely.

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70 *E.g., WorldCom Comments,* at 3; *MCI Comments,* at 9.

71 Letter from Chairman Kennard to Hon. John McCain (Apr. 29, 1998), at 9; Letter from Commissioner Ness to Sen. McCain (Apr. 29, 1998), at 7; Letter from Commissioner Powell to Sen. McCain (Apr. 29, 1998), at 5; Letter from Commissioner Tristani to Sen. McCain (Apr. 29, 1998), response to Q. 17; Letter from Commissioner Furchgott-Roth to Sen. McCain (Apr. 29, 1998), response to Q. 17.

72 *U S West Comments,* at 23-24.

73 *SBC Comments,* at 16.

The attempt by ILECs to sweep the Act's express limitations on the exercise of forbearance authority under the rug is understandable, since the very relief they seek would prevent them from ever satisfying the express preconditions to forbearance. Section 10(d) and 271 require that services be made available for interconnection, unbundling and resale *before* forbearance treatment can be considered, yet it is exactly these pre-conditions to competition that the ILECs seek to avoid with respect to their advanced services and data networks. However, the statute is clear, and is fatal to the ILECs preferred approach to Section 706.

Conclusion

The weight of the comments filed on the ALTS Petition suggest two obvious conclusions: (1) the relief requested by ALTS is necessary to realize the goals of Section 706; and (2) the RBOC Section 706 Petitions are thinly veiled attempts to upend the 1996 Act through the creation of new ILEC monopolies over digital telecommunications services and facilities. Accordingly, the Commission promptly should issue orders granting ALTS' Petition and

denying the RBOCs' Section 706 Petitions. Consistent with Section 706, the Commission also should issue an NOI to explore additional means of fostering competition in the market for advanced services.

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June 25, 1998

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